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Supreme Court of the United States

APRIL TERM, 1960

No. 833

M. MELINDA BERRY, ADMINISTRATRIX OF THE ESTATE OF ROBERT H. BERRY, DECEASED, PETITIONER,

versus

ATLANTIC COAST LINE RAILROAD COMPANY AND CAROLINA POWER & LIGHT COMPANY, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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versus

ATLANTIC COAST LINE RAILROAD COMPANY AND CAROLINA POWER & LIGHT COMPANY, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner prays for a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on January 6, 1960.

OPINIONS BELOW

The opinion of the District Court (App. 33) was not reported. The opinion of the Court of Appeals (App. 19) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1960. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

QUESTIONS INVOLVED

1. When the locus of a diversity case is a state where the *scintilla* rule of evidence prevails, may a Federal Court, contrary to the doctrine of *Erie v. Tompkins*,[1] dispose of the case on motion for summary judgment under Rule 56 Fed. Rules Civ. Proc., 28 U. S. C. A. without affording the party resisting the motion the benefit of *scintilla* in determining the legal sufficiency of his evidence to withstand the motion?

2. When a diversity case is challenged by a motion for summary judgment under Rule 56 Fed. Rules Civ. Proc., 28 U. S. C. A., may a Federal Court, contrary to the doctrine of *Erie v. Tompkins*, dispose of the case by deciding the issue of ngligence according to a test of foreseeability different from that of the state where the action arises?

3. Where a diversity case is challenged by a motion for summary judgment under Rule 56, Fed. Rules Civ. Proc., 28 U. S. C. A., is it not an invasion of the province of the jury, contrary to the 7th Amendment to the United States Constitution, for the Court to dispose of he case by concluding questions of fact on issues of negligence in the light most favorable to the movant and most unfavorable to the party resisting the motion?

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[1] *Erie R. Co. v. Tompkins*. 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

4. Where a diversity case is challenged by a motion for summary judgment under Rule 56, Fed. Rules Civ. Proc., 28 U. S. C. A., is it not an invasion of the province of the jury, contrary to the 7th Amendment to the United States Constitution, for the Court to dispose of the case by concluding **mixed questions** of law and fact in the light most favorable to the movant and most unfavorable to the party resisting the motion?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment VII.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

28 U. S. C. 2106

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

STATEMENT OF CASE

Petitioner, a resident of South Carolina, brought suit, in capacity of administratrix, against respondent Atlantic Coast Line Railroad Company, a Virginia corporation, and respondent Carolina Power & Light Company, a North Carolina corporation, for their joint and several negligence, first, in maintaining a high voltage, uninsulated electric power line in close proximity to a railroad sidetrack, and,

second, in parking there a freight car of steel required to be unloaded by a crane so that on the occasion involved, December 3, 1955, the crane being used to unload the steel from the freight car, came in contact with the high voltage, uninsulated electric power line and killed petitioner's son who was there assisting in the unloading operation—but not operating the crane.

The respondents moved the District Court for summary judgment primarily on the ground "that neither of the defendants was guilty of any actionable negligence which contributed to the injury and death of Robert H. Berry", heretofore identified as petitioner's son. The motion for summary judgment was heard on the pleadings, affidavits, exhibits and interrogatories of the parties and a discovery deposition of Calvin O. Berry taken by respondents on January 31, 1957.

The scene of the fatality is Revels Station, near Florence, South Carolina where the main line of the respondent Atlantic Coast Line Railroad Company, sometimes hereinafter referred to as the railroad company, runs in a north to south direction. At Revels Station the railroad company maintains a siding consisting of two sidetracks. The second of these sidetracks, the one here involved, was built by respondent railroad company in 1953. This sidetrack branches off from the first sidetrack and extends in a northeasterly direction towards and then alongside a high voltage, uninsulated electric power line of the respondent Carolina Power & Light Company, sometimes hereinafter referred to as the power company. A space of 70 feet lies between this sidetrack and the electric power line at the point where it branches off from the first sidetrack but this space narrows down to 25 feet at the point where the sidetrack terminates, and in this latter area the railroad company parked or spotted its freight car of steel for unloading.

The unloading operation was being performed by Wilhoit Steel Erectors, an independent contractor. Petitioner's son, a minor, sixteen years of age, was an employee of Wilhoit Steel Erectors and he was assisting in the unloading operation. In order to unload the freight car of steel a crane was positioned alongside the freight car and a tractor-trailer motor vehicle was situated on the other side of the crane so that the crane, operating between the two conveyances, lifted the steel out of the freight car, pivoted around, and then let the steel down onto the track. In the course of the unloading operation the cable extending from the boom of the crane came in contact with the power line while the crane was maneuvering a bundle of steel from the freight car to the track. Petitioner's son who was standing on the ground nearby was killed by the current of high voltage electricity which carried through the cable of the crane, into the steel, and through his body into the ground.

The District Court granted respondents' motion for summary judgment by passing a brief order of less than one hundred fifty words in which none of the evidence or issues of the case were discussed. (App. 34)

Upon appeal, the Court of Appeals reached a factual finding, from its own view of the testimony, as to (1) whether respondent power company negligently maintained its high voltage, uninsulated electric power line too close to the sidetrack of respondent railroad company, (2) whether respondent railroad company negligently constructed and maintained its sidetrack too close to the high voltage, uninsulated electric power line of defendant power company, and (3) whether respondent railroad company negligently parked too close to respondent power company's high voltage, uninsulated electric power line the carload of steel required to be unloaded by a crane. There was testimony that a cause of the accident was the power line being

too close to the sidetrack. The sufficiency of this and other evidence to require submission of the case to the jury, as appears from the opinion of the Court of Appeals, was not tested by the *scintilla* rule which prevails in South Carolina. Moreover, the Court of Appeals, in passing upon the question of negligence decided the issue of foreseeability involved therein according to a test different from that embodied in the substantive law of South Carolina.

The decision of the Court of Appeals was rendered on January 6, 1960. Thereafter petititoner submitted a petition for rehearing,[2] taking the position that the Court of Appeals, in deciding questions of fact in the case, assumed the functions of the jury, and, more particularly, that opinion of the Court of Appeals showed on its face that the Court did not apply the *scintilla* rule, which prevails in Sotuh Carolina, in testing the legal sufficiency of petitioner's evidence. "Viewing the issue here under the *scintilla* rule which, as heretofore stated, prevails in South Carolina," the petition for rehearing asserted, "It is clear that in order for the Court to reserve for itself the task of determining whether or not defendant power company in the case here exercised the high degree of care required of it, the evidence thereabout must be **conclusive** and not **'some'** evidence of due care (App. 24), as was found by this Court in the instant case." Rehearing of the appeal on this and other grounds stated in the petition was denied by the Court below on February 29, 1960.

[2] Petitioner's petition for rehearing in the Court of Appeals was not permitted to be filed because the printed copies of the petition, due to mailing difficulties, did not reach the office of the Clerk of Court in time to be within the thirty day period allowed for filing of petition for rehearing. The Clerk of the Court of Appeals, however, by letter of February 29, 1960 advised petitioner as follows: "I have been instructed by the Court to inform you that the Court has read the petition and is of the opinion that it is without merit; and the Court has instructed me not to file the petition because it was not received within the time permitted by the rule." Therefore, it appears that the grounds stated in the petition were passed upon, informally however, by the Court of Appeals in its denial of a rehearing.

REASONS FOR GRANTING THE WRIT

1. The decision of the Fourth Circuit is not in accord with the doctrine of *Erie v. Tompkins, supra*, and is in conflict with the decisions of other Circuit Courts: The issues involved in this petition for a writ of certiorari are (1) whether it is proper for a Court of Appeals to apply a state or federal test of sufficiency of evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship; and (2) whether a Court of Appeals has power to decide questions of fact and mixed questions of law and fact in negligence cases without invading the province of the jury contrary to the 7th Amendment to the United States Constitution.

On the first issue the substantive law of South Carolina regarding the applicable test for determining the sufficiency of evidence to support a jury verdict is clear. The substantive law of South Carolina regarding the applicable test of foreseeability in a negligence case is also clear. The *scintilla* rule of evidence prevails in South Carolina. *Woodle v. Brown*, 223 S. C. 204, 74 S. E. (2d) 914; *Wright v. Gilbert*, 227 S. C. 334, 88 S. E. (2d) 72. Under *scintilla* the well established rule in South Carolina is that "if there is **any testimony whatever** to go to the jury on an issue involved in a cause" the case must be submitted to the jury. *Callum v. Southern Railway Co.*, 189 S. C. 336, 1 S. E. (2d) 235.

On the first issue the opinions and practice of the Fourth Circuit Court of Appeals are in conflict with the opinions and practices of other Circuit Courts. In *Davis Frozen Foods, Inc., v. Norfolk Southern R. Co.* (C. A. 4, N. C.), 204 F. (2d) 839, and in prior decisions[3] the Fourth

[3] *McSweeney v. Prudential Ins. Co. of America* (C. A. 4, S. C.), 128 F. (2d) 660; *Gorham v. Mutual Ben. Health & Accident Ass'n* (C. A. 4, N. C.). In these cases the Fourth Circuit regards the language of this Court in *Herron v. Southern Pacific Co.*, 283 U. S. 91, as authority for its position. In none of these cases, however, does the Court comment on the effect of *Erie R. Co. v. Tompkins, supra*, or *Stoner v. New York Life Ins. Co.*, 311 U. S. 464, 468, decided by this Court prior to *Davis*

Circuit Court of Appeals has resolved the question of whether there is a sufficiency of evidence or proof to submit a case to the jury as procedural and controlled by federal and not local, state law. The opinions and practice of the Court of Appeals for the Fourth Circuit, however, are in conflict with that of the Court of Appeals for the Eighth Circuit, expressed in *Clay County Cotton Co. v. Home Life Ins. Co.* (C. A. 8, Ark.), 112 F. (2d) 856, 861:

> "The appellee contends that in directing a verdict in this case the court was merely applying the procedure of the forum, that federal decisions and not the law of Arkansas control; or in other words, that the problem presented is one of adjective and not substantive law. The question presented by the motion to direct a verdict was whether a cause of action had been proved, which clearly is a question of substantive law and the state law applied. This is too definitely settled to admit of further argument. (Citing *Erie Railroad Company v. Tompkins, supra.*)"

The Circuit Courts of Appeal are not ~~in~~ agreement on this question as appears from the tabulation of cases in footnote,[1] but a majority of the Circuit Courts apply state tests

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v. Frozen Food, Inc., v. Norfolk Southern R. Co., supra. See Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 174 and 5 Moore's Federal Practice (2 Ed. 1951), Sec. 38.10.

[1] A majority of the Circuits apply state tests:

Second Circuit: *Rowe v. Pennsylvania Greyhound Lines, Inc.* (C. A. 2, N. Y.), 231 F. (2d) 922.

Third Circuit: *Cooper v. Brown* (C. A. 3, Pa.), 126 F. (2d) 874.

Sixth Circuit: *Lovas v. General Motors Corp.* (C. A. 6, Ohio), 212 F. (2d) 805.

Seventh Circuit: *Rytex Co. v. Ryan* (C. A. 7, 111), 126 F. (2d) 952, 954.

Eighth Circuit: *Clay County Cotton Co. v. Home Life Ins. Co.* (C. A. 8, Ark.), 112 F. (2d) 856.

A minority of the Circuits apply federal tests:

Fourth Circuit: *Davis Frozen Foods, Inc., v. Norfolk Southern R. Co.* (C. A. 4, N. C.), 204 F. (2d) 839.

Fifth Circuit: *Reuter v. Eastern Air Lines, Inc.* (C. A. 5, Ala.), 226 F. (2d) 443.

Tenth Circuit: *Diederich v. American News Co.* (C. A. 10, Okla.), 128 F. (2d) 144.

in determining the sufficiency of evidence for submission of a case to the jury.

In the factual finding reached by the Court of Appeals from its own view of the testimony, the Court below did not apply the scintilla test which prevails in South Carolina to petitioner's case; and, furthermore, in deciding the issue of negligence, the Court below even went so far as to determine the question of foreseeability involved therein according to a test different from that of South Carolina. The deposition of Calvin O. Berry, the crane operator, was taken by respondents. At the taking of his deposition, upon direct examination conducted by counsel for respondent Carolina Power & Light Company, he testified as follows:

"Q. So then, do you say that it was the tilt in the crane that caused the crane to contact the power line?

A. Well, in a way yes and in a way no.

Q. Well now, what do you mean by that? You will have to explain that?

A. If the power line hadn't been so close there, it wouldn't have come in contact.

The Court of Appeals concluded that the location of the sidetrack and the carload of steel required to be unloaded by a crane were not located too close to the high voltage, uninsulated electric power line mainly upon evidence of respondents' compliance with the minimum clearance requirements prescribed by the public service commission. The Court stated in its opinion that compliance with the minimum clearance requirements "is, at least some evidence of the exercise of due care." (App. 24) (Emphasis by

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The opinion of the Court of Appeals cites *Elliot v. Black River Elec. Co-op.*, 233 S. C. 239, 104 S. E. (2d) 357, 362, but the language of the Court in that case is plainly to the effect that the crucial question, *viz.*, Was the electric power line negligently located, is a question of fact for the jury and not a question of law for the Court. In the *Elliot case, supra*, the South Carolina Supreme Court declared:

"But assuming that it was a 'building' within the meaning of the regulation, compliance with the minimum clearance requirements was not conclusive evidence of due care in that regard.

Court of Appeals.) This evidence is not deemed conclusive of the negligence issue under South Carolina law. See footnote 5. Also, for a good statement of the principle involved, note the expression of the Court in *Jensen v. Sou. Pac. Co.*, 278 P. (2d) 703, 707:

> "The state, in prescribing such safety regulations has never gone so far as to say to a utility company that compliance therewith constitutes a complete discharge of its duties toward the public. The state does not undertake to foresee and declare in advance what under all circumstances constitutes ordinary care. Legislation of this nature lays down minimum, not maximum requirements."

The Court of Appeals in permitting disposition of this case on a summary judgment treated the case as one in which there was no evidence pertaining to the allegations of petitioner's complaint. But this was not a case in which there was no evidence for the jury, as the fact finders, to pass upon. The evidence of record showed that respondent railroad company elected to construct a sidetrack that angled off towards a high voltage, uninsulated electric power line, extending the sidetrack to a point within 25 feet of the high voltage, uninsulated electric power line. The evidence of record showed that for a period of three years respondent power company knew of the close proximity of the sidetrack to its high voltage, uninsulated electric power line but did nothing to effect a removal of the sidetrack or electric power line to a safe distance, nor did anything in the alternative to insulate its wires or give notice that the wires were being used for the transmission of dangerous, high voltage electricity. The evidence of record showed that respondent railroad company located its freight car of steel

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Whether or not the defendant negligently located its high-voltage line was an issue to be determined in the light of all the facts and conditions disclosed by the testimony." (Emphasis supplied.)

required to be unloaded by a crane within 27 feet 8 inches of the high voltage, uninsulated, electric power line. The evidence of record in this case as well as certain allegations of the complaint not controverted by respondents' testimony and therefore appropriate for consideration on a motion for summary judgment, all rendered the fact question of the case a question for the jury and not the Court. The question of whether respondent power company failed to exercise the **very high degree of care** required of it and whether respondent railroad company failed to exercise the **ordinary care** required of it in maintaining a high voltage, uninsulated electric power line in close proximity to the sidetrack and locating thereat a freight car of steel required to be unloaded by a crane was a question of fact for the jury.

It would seem that, applying either the federal or state test of sufficiency of evidence to this case, to this case the question of whether or not respondents were jointly or severally negligent is a question properly for the jury and not the Court; certainly, giving petitioner benefit of the *scintilla* rule of evidence which prevails in South Carolina, submission to the jury of this question of fact for its determination would be required, with the testimony being that, at least a proximate cause of the accident, without which it would not have happened, was the fact that the high voltage, uninsulated electric power line was located "so close there" to the sidetrack.

In its opinion the Court of Appeals also, as a basis of its concluding the issue of negligence in favor of respondents, applied a test of foreseeability different from that which prevails in South Carolina, when it declared: "Applying this principle as announced in Mania (*Mania v. Potomac Elec. Power Co.*, 268 F. (2d) 793, 4th Cir., Cert. den. December 7, 1959), it is clear that the acts, conduct and omissions of Calvin Berry * were beyond the bounds of any-

* The crane operator.

thing which might reasonably have been anticipated by the power company." What might be reasonably anticipated by a power company, according to the Maryland test of foreseeability, is stated in the *Mania case, supra*, at page 797 of the opinion, as follows:

> "In accordance with these basic principles, the law does not require that a person, who maintains even so deadly an instrumentality as a high voltage electric wire, shall anticipate at his peril every possible fortuitous circumstance under which some person might make a contact with the wires resulting in injury or death."

It may be that under the above stated test of foreseeability in a negligence case, one may escape from, or not be charged with liability, where the connecting line in the chain of causation can be denominated or deemed a "fortuitous circumstance." This is what the Fourth Circuit Court of Appeals deemed the connecting line of causation in the *Mania case, supra*, "one of those 'fortuitous circumstances'", as appears at page 798 of its opinion in the cited case. But the test of foreseeability, as it applies to cases of this kind in South Carolina, does not permit such latitude; and to make this point clear and positive the South Carolina State Supreme Court declared in the case of *Tobias v. Carolina Power & Light Co.*, 190 S. C. 184, 2 S. E. (2d) 686, that a wrongdoer "cannot shelter himself behind the defense that the actual consequence was one that **rarely** follows from that particular act." (Emphasis supplied.) The test of foreseeability which the Court of Appeals applied in the case herein was not according to the South Carolina test of foreseeability in a negligence case.

The allowance of the petition in this case would afford this Court the opportunity to review and resolve the problems involved herein on an important question of federal procedural law and appellate review (See *Dick v. New York*

Life Ins. Co., 359 U. S. 437, 445), in which there are conflicts among the Circuit Courts of Appeals which should be resolved by this Court, in the interest of uniform and orderly administration of justice in the Courts below.

2. **The action of the Court below constituted an invasion of the province of the jury contrary to the 7th Amendment to the United States Constitution:** A fair reading of the opinion of the Court below indicates that it treated the issue of negligence in this case as a mixed question of law and fact. Assuming, for purposes of argument, the question to be determined was not purely a fact question but a mixed one of both law and fact, it is clear that the question became one for determination by the jury and not the Court. It is the settled law of both this Court and the South Carolina Courts that where an issue in a case presents mixed questions of law and fact such questions should be submitted to the jury. *Tucker v. Spalding*, 13 U. S. 453; *Connor v. Johnson*, 59 S. C. 115, 137, 37 S. E. 240. In the first cited case this Court declared that "the ultimate answer to mixed questions of law and fact must come from the jury"; and in *Connor v. Johnson, supra*, the South Carolina State Supreme Court declared that under the law of South Carolina when the question to be decided is a mixed question of law and fact all that the court can properly do is "to lay down the principles of law applicable to the case, and leave the jury to apply those rules to the facts as found by them."

The Court below properly stated the principles of substantive law of South Carolina applicable to respondent power company which is that those who deal in the use of dangerous instrumentalities such as electricity "are required to exercise a very high degree of care in their construction, repair, inspection and maintenance in order to prevent injury to others." (Our quotation from *Lindy v.*

Telephone Co., 90 S. C. 25, 72 W. E. 558); *Eargle v. Sumter Lighting Company*, 110 S. C. 560, 567, 96 S. E. 909; *Hill v. Carolina Power & Light Company*, 204 S. C. 83, 28 S. E. (2d) 545. The Court, however, went on to determine the fact question involved as to whether or not respondent power company had exercised "a very high degree of care" in permitting its high voltage, uninsulated electric power line to be maintained within 27 feet 8 inches of respondent railroad company's sidetrack. Furthermore, in resolving the issue of negligence in this case as it did, the Court below dealt with the question of foreseeability, heretofore discussed and intervening negligence. In passing upon the latter question the Court below concluded that the respondents were not bound to foresee "the acts of omission and absence of caution on the part of Calvin Berry", the crane operator. The Court concluded that respondents were not liable upon its view of the facts on the question of intervening negligence. Petitioner respectfully urges that appropriate instructions to the jury on the South Carolina law pertaining to foreseeability and intervening negligence was properly for the Court but it was for the jury to apply such law to the facts as found by them. *Tucker v. Spalding, supra; Connor v. Johnson, supra.*

Petitioner cited to the Court of Appeals the law of South Carolina, which rarely relieves a wrongdoer from his negligence because of the intervening negligence of a third party. *Tate v. Claussen-Lawrence Const. Co.*, 168 S. C. 481, 493, 162 S. E. 826, and cases cited therein. *Tobias v. Power & Light Co.*, 190 S. C. 181, 2 S. E. (2d) 686. With respect to respondent railroad company, petitioner endeavored to demonstrate her position further to the Court of Appeals by pointing to a specific Court instruction applicable to the law of South Carolina and the facts of the instant case, approved in *Southern Railway Company v. Jones* (C. A. 6, Tenn.), 228 F. (2d) 203, 211, as follows:

"It was the duty of the railroad spotting the cars to exercise ordinary care to leave them in such condition that they would not by reason of defects in the cars or **precariousness of their positions**, be of potential danger to plaintiff's intestate—that is the deceased in this case—or others engaged in unloading operations in the cars further down hill. If it was reasonably foreseeable that original negligence, if any, existing in the form of defects or **dangerous location** would result in injury, either directly through such defects or location, as a result of intervening action from some third party, the fact that a third party negligently intervened would not relieve the railroad from liability for its original negligence, if it was originally negligent." (Emphasis supplied.)

It has been too firmly established by a long line of decisions of this Court to hardly require any discussion or argument that it is an undue invasion of the jury's historic function for a Court to weigh conflicting inferences and conclusions that may be drawn from the evidence.

Wilkerson v. McCarthy, 336 U. S. 53;
Lavender v. Kurn, 327 U. S. 645;
Sartor v. Arkansas Natural Gas Corp., 321 U. S. 621;
Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29.

Sartor v. Arkansas Natural Gas Corp., 321 U. S. 621, teaches that "summary judgment is a drastic innovation which can easily be used to deny trial by jury." The Courts below recognize this principle. "A litigant has a right to a trial where there is the **slightest doubt** as to the facts," *Doehler Metal Furniture Co. v. United States* (C. A. 2, N. Y.), 149 F. (2d) 130. Petitioner respectfully urges that it is clear from all that we have endeavored to point out herein that the Court of Appeals did not observe these principles in the decision and opinion which it rendered.

The issue raised under this heading involves an important question of federal appellate review on which the decision of the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for Writ of Certiorari.

Respectfully submitted,

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